

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Carriage of Digital Television Broadcast)	CS Docket No. 98-
120		
Signals: Amendments to Part 76)	
of the Commission's Rules)	

**OPPOSITION OF CROWN MEDIA UNITED STATES, LLC, THE
OUTDOOR CHANNEL, INC., GAME SHOW NETWORK, LLC AND STARZ
ENTERTAINMENT GROUP LLC TO THE PETITION FOR
RECONSIDERATION FILED BY THE NATIONAL ASSOCIATION OF
BROADCASTERS AND THE ASSOCIATION FOR MAXIMUM SERVICE
TELEVISION, INC.**

Crown Media United States, LLC (“Hallmark Channel and Hallmark Movie Channel”), The Outdoor Channel, Inc. (“Outdoor Channel”), Game Show Network, LLC (“Game Show Network”) and Starz Entertainment Group LLC (“Starz”) (“Programmers”) hereby oppose the Petition for Reconsideration of the Commission’s Second Report and Order in this proceeding, filed by the National Association of Broadcasters and the Association for Maximum Service Television, Inc (“NAB/MSTV” or “Petitioners”). See Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., CS Docket No. 98-120 (filed Apr. 21, 2005) (“Petition”)

PRELIMINARY STATEMENT

The Programmers provide advertiser-supported and premium programming services to cable and DBS operators and other MVPDs. In contrast to broadcasters, they compete against hundreds of video programmers to secure cable carriage. The Programmers oppose NAB/MSTV's Petition for Reconsideration of the Commission's decisions in the Second Report and Order denying mandatory dual and multicast digital carriage. See Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Second Report and Order, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005) ("Second Report and Order").

The Petition largely resurrects arguments that the Commission has considered fully and decided or that are irrelevant at this point in the DTV transition. The NAB/MSTV expanded cable system capacity cure-all that purportedly would support dual and multicast must carry for broadcasters and allow programmer access to cable carriage does not support reconsideration and is inconsistent with the Programmers' experience.

The Programmers provide the very kinds of diverse programming that the Commission has sought to protect:

- Crown Media distributes the Hallmark Channel and Hallmark Movie Channel. The Hallmark Channel is an advertiser and license fee supported programming service that provides award-winning, family-oriented programming, including original movies and series, mini-series and first-run presentations from Hallmark Entertainment and third parties, as well as syndicated programs. Hallmark Channel and Hallmark Movie

Channel are the exclusive “home” for movies from the "Hallmark Hall of Fame Collection" after their initial airing on broadcast television. The Hallmark Movie Channel, launched last year, features top-rated movies and mini-series, many of which are produced by Hallmark Entertainment, the world’s largest producer of made-for-television movies and mini-series.

- Game Show Network operates GSN-The Network for Games (“GSN”). GSN is the only United States television network dedicated to games, game-related programming and interactive game playing. The network features game shows, reality games, documentaries about competition, card game shows and other programs. GSN offers innovative and family-friendly original programming such as Lingo, a word game; and American Dream Derby, a reality game for those who dream of owning thoroughbred race horses; and classic game shows such as Password and the \$25,000 Pyramid.
- Starz provides a variety of premium movie networks, including: (1) Starz Encore Movie Pack with 13 digital movie channels and airing hundreds of movies per month; (2) Starz HD, a high-definition feed of Starz; (3) Starz On Demand; and (4) Starz Ticket, the first and only on-demand premium subscription service available on the broadband platform.
- The Outdoor Channel features quality programming designed to educate and entertain sportsmen of all skill levels. The Outdoor Channel promotes the traditional outdoor activities that are an important part of our national heritage, including fishing, hunting and shooting sports. The Outdoor Channel’s programming is designed to appeal to “traditional sportsmen” of all ages with a focus on activities that the entire family can enjoy in the great outdoors. The Outdoor Channel also recently launched Outdoor Channel 2HD, a high-definition service featuring the outdoors.

I. The Commission Should Reject the “Plain Meaning” Argument
 Advanced Yet Again by Petitioners.

Throughout the long history of this proceeding, in its initial Petition for Reconsideration in response to the Commission's First Report and Order and in subsequent ex parte submissions, the Petitioners have argued repeatedly that the plain language of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") compels mandatory carriage rights for both analog and digital signals. The Commission twice has considered and rejected--with good reason--the Petitioners' "plain meaning" argument. The Commission likewise should reject Petitioners' attempt to revive this statutory interpretation argument yet again on reconsideration.

By now, the Petitioners' déjà vu statutory interpretation arguments in the present Petition must sound familiar to the Commission:

First, the Commission misinterpreted the Cable Act, which provides for carriage rights for both analog and digital signals of local commercial television stations for both transitional carriage and multicasting.

The Plain Language of Section 614 Requires Carriage of Analog and Digital Television Signals....

The structure and purposes of Section 614 and subsequent congressional statements both demonstrate that all non-subscription portions of a digital television signal are entitled to carriage.

Simply put, the only reasonable way to accommodate the purpose, structure, and intent of the statute is to apply the must carry obligations to the full digital broadcast.

See Petition at 2, 4, 7 & 9.

They are familiar because the Petitioners made essentially the same

arguments in their initial Petition for Reconsideration and Clarification filed in response to the First Report and Order:

The explicit and plain language of the must carry statute direct that “each cable operator shall carry, on the cable system of that operator, the *signals* of local commercial television stations.”... Indeed, there is no other permissible interpretation of the plain statutory language.

Thus, by its clear and unambiguous terms, Section 614 applies to *the signals of any full power commercial television broadcast station licensed and operating on a channel regularly assigned to its community by the Commission*, not otherwise excluded by the terms of Section 614.

The same sort of plain language reading must be applied here to the statutory must carry provisions, with the only possible result being application of the statutory must carry command to all digital broadcast signals during the transition.

The Commission is not free to reject the plain language of the statute--which compels carriage of all local broadcast signals, analog *and* digital--on the basis of an unsupported and tentative analysis of the constitutionality of the statute’s command.

See NAB/MSTV/ALTV Petition for Reconsideration and Clarification, CS Docket No. 98-120 (filed Apr. 25, 2001) (“Initial Reconsideration Petition”)(emphasis in original, note omitted), at 6-7, 9.

NAB and other broadcasters advanced this same tortured statutory argument in ex parte submissions to the Commission. See, e.g., Ex Parte Communication of The National Association of Broadcasters, Maximum Service Television, Inc., Association of Public Television Stations, Public Broadcasting Service and Corporation for Public Broadcasting, CS Docket 98-120 (filed Sept. 5, 2002) (based upon statutory provisions, “the entirety of the

free video and audio (the ‘primary’ broadcast service), the closed captioning information, and the program-related material contained in the digital bit stream should be carried as of right.”).

Given the extensive paper trail for these same tired arguments, the Commission correctly noted that “[t]he arguments that the parties have presented in support of a statutory reading to require dual carriage essentially are no different from those that have previously been submitted, considered, and rejected in the *First Report and Order*.” Second Report and Order at ¶13 (note omitted). Under the Commission’s “well-established” standards and requirements governing petitions for reconsideration, such petitions “are not granted for the purpose of altering [the Commission’s] findings on the basis of matters that already have been fully considered and substantively settled.” See Creation of an Additional Private Radio Service, 1 FCC Rcd. 5 (1986), at ¶9. Consistent with its precedent, the Commission should not allow the Petitioners to reassert on reconsideration these fully considered and substantively settled arguments. These repeated arguments should be summarily denied.

II. Contrary to the Petitioners’ Recycled Arguments, Mandatory Dual and Multicast Must Carry are Not Essential to Facilitate the DTV Transition.

The Commission concluded in the Second Report and Order that mandatory digital carriage was not required to “effectuate the DTV

transition.” Id. at ¶13. The Petitioners nevertheless rehash old assertions that mandatory digital carriage is necessary to promote the DTV transition:

The Commission entirely ignored the substantial governmental interests in the digital transition.... If some broadcasters’ digital signals are not carried on cable systems during the transition, the owners of digital receivers who subscribe to cable will not receive those stations’ DTV signals. Not only will those stations have less ability to develop attractive digital programming--the situation that the Court in *Turner* agreed Congress was justified in protecting--but they will still have to shoulder the substantial costs of building and operating digital facilities with diminished opportunities to recoup that investment.

Petition at 17-18. In 2001, the Petitioners maintained that the Commission’s initial denial of mandatory digital carriage would “impair the DTV transition.” Initial Reconsideration Petition at 2.

The Commission’s Eleventh Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (“Eleventh Annual Report”), however, confirms that the DTV transition continues to progress in the absence of mandatory dual and multicast carriage. Specifically, the Eleventh Annual Report noted the following regarding the DTV transition:

- As of September 2004, all of the 40 stations that make up the top four network affiliates in the top ten television markets were broadcasting DTV service.
- More than 1,468 stations are on the air with DTV operations.
- NAB itself estimates that 88.8 percent of U.S. television households are in markets that have access to at least five over-the-air DTV signals, and 71.1 percent have access to at least eight or more DTV signals.

- NCTA estimates that as of September 15, 2004, 90 million homes were passed by a cable system that offers programming in HD format, broadcast and/or non-broadcast, and cable operators were carrying more than 454 digital broadcast stations.

See Eleventh Annual Report, MM Docket No. 04-227, FCC 05-13 (rel. Feb. 4, 2005), at

¶¶80-81 (notes omitted).

In addition, the Eleventh Report summarizes the “numerous Commission actions and industry efforts aimed at accelerating and improving the DTV transition,” including adoption of the following regulations and other requirements: (1) “plug and play” rules and ongoing efforts among interested parties to reach an agreement for two-way “plug and play” receivers that would eliminate the need for a set-top box to receive two-way advanced cable services; (2) the 2004 Broadcast Flag Order adopting digital copy protection rules to ensure that DTV broadcast content will not be unlawfully redistributed over the Internet; (3) specific measures relating to the DTV transition, such as channel election procedures and deadlines for replication and maximization of DTV signals; and (4) children’s television requirements for digital broadcasters. See Eleventh Annual Report at ¶¶89-94.

Thus, given the Commission’s wide-ranging efforts to facilitate the DTV transition, and the progress that has been made so far, mandatory digital carriage clearly is not essential to the transition’s success. In fact, as

the Programmers noted in an ex parte submission in this proceeding, “if broadcasters provide desirable local content, cable operators will carry it as a result of fair competition in the free market and not government mandate.” See Written Ex Parte Submission of Crown Media, Outdoor Channel, Game Show Network and International Networks, LLC, CS Docket No. 98-120 (filed Feb. 3, 2005) (“Programmer Ex Parte Submission”), at 5.¹ The Programmers specifically cited the public statement of the NBC Television Network Group President that, “[i]f you have good content, there’s a million ways to get distribution” made in connection with NBC’s “business plan of jointly producing digital-TV channels’ if the Commission does not order multicast must-carry.” Id. at 5-6.

¹ Starz did not participate in the ex parte submission.

III. The Cable System Capacity Data Offered by the Petitioners
Obscure The Realities of the Video Programming Services
Market.

The Petitioners also point to “record evidence” purporting to demonstrate that, as a result of expanding cable system capacity, mandatory dual and multicast must carry would not “foreclose cable systems from carrying any other programs of their choice.” Petition at 12-13. They further assert that mandatory digital carriage “would not diminish any cable programmer’s opportunity to place its programs onto cable systems.” Id. at 13.

However, based upon the Programmers’ experience, the Petitioners’ confident predictions of undiminished carriage opportunities for programmers under a mandatory must carry regime do not square with the realities of the present programming marketplace. As the Programmers previously noted in this proceeding, broadcasters “seek immediate and guaranteed distribution of their programming services to all cable subscribers, without regard to whether programming services such as ours are not launched or are deleted as a result of their claimed entitlement to carriage.” See Programmer Ex Parte Submission at 1.

The Commission recognized in the Second Report and Order that mandatory dual and multicast carriage will not promote any governmental interest and in fact may reduce cable carriage opportunities for other programming voices:

Likewise, based on the current record, there is little to suggest that requiring cable operators to carry more than one programming stream of a digital television station would contribute to promoting “the widespread dissemination of information from a multiplicity of sources.” Under a single channel must carry requirement, broadcasters will have a presence on cable systems. Adding additional channels of the same broadcaster would not enhance source diversity. Furthermore, programming shifted from a broadcaster’s main channel to the same broadcaster’s multicast channel would not promote diversity of information sources. Indeed, mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system.

See Second Report and Order at ¶39 (note omitted).

On a day-to-day basis, the Programmers face the difficult task of gaining cable carriage through creative development of their programming services, aggressive marketing and difficult negotiations with cable operators. Rosy “win-win” scenarios for broadcasters and programmers in a mandatory dual and multicast must carry world simply do not comport with the reality which the Programmers encounter daily. Contrary to the Petitioners’ suggestions, the Programmers must contend with existing channel capacity constraints as they attempt to expand distribution of existing services and to launch new programming services. In short, expanded cable system capacity will not provide a “cure-all” solution to programmer access to cable distribution.

CONCLUSION

For the reasons set forth above, the Programmers respectfully request that the Commission deny NAB/MSTV's Petition for Reconsideration regarding the Second Report and Order. The Petitioners offer only a rehash of arguments previously considered and properly rejected by the Commission. The time has come for the Commission to end this proceeding and provide certainty to the regulatory framework of the programming marketplace so that the Programmers can compete knowing tomorrow's rules, build their business, and provide programming sought by viewers.

Respectfully submitted,

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